UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/428,203	10/27/1999	CHRISTOPHER O. OKUNJI	003/172/SAP	4366

7590 09/26/2012

ELIZABETH A. ARWINE
USAMRMC
FORT DETRICK
BUILDING 521
FREDERICK, MD 21701

EXAMINER	
FLOOD, MICHELE C	

ART UNIT	PAPER NUMBER
1655	

MAIL DATE	DELIVERY MODE
09/26/2012	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte CHRISTOPHER O. OKUNJI, MAURICE M. IWU, JOAN E. JACKSON, JOHN D. TALLY JR., CYRUS BACCHI and JOHNSON F. AYAFORM

Appeal 2011-013553
Application 09/428,203
Technology Center 1600

Before TONI R. SCHEINER, STEPHEN WALSH, and ERICA A. FRANKLIN, *Administrative Patent Judges*.

FRANKLIN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134(a) involving claims to a biologically active extract comprising a fractionated extract from *Napoleonaea imperialis*. The Patent Examiner rejected the claims as anticipated. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

STATEMENT OF THE CASE

Claims 1, 11, 30 and 38 are on appeal. Claim 1 is representative and read as follows:

1. A biologically active extract comprising a fractionated extract from *Napoleonaea imperialis*, wherein said extract is obtained using an organic solvent, and wherein said biologically active extract is saponin-enriched and exhibits therapeutic anti-leishmanial activity.

The Examiner rejected all of the claims under 35 U.S.C. §102(b) as anticipated by Kapundu.[1]

Claims 11, 30 and 38 have not been argued separately and therefore stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(vii).

ANTICIPATION

The Examiner found that Kapundu taught a methanol extract from powdered seeds of *Napoleaonaea imperialis*, wherein the methanol powdered seed extract comprises saponin. (Ans. 6.) The Examiner considered the recited therapeutic anti-leishmanial activity of the saponin-enriched extract to be inherent to the extract taught by Kapundu because the source of Kapundu's plant, the extract from the plant, and the solvent used for such extraction were the same as in the claimed invention. (*Id.*)

Appellants contend that Kapundu's intermediate methanolic extraction step does not teach the claimed invention which provides "a unique composition that is effective in the treatment of a debilitating disease, leishmania, similar to the purity standard established by *Sanofi-Aventis*."

---

[1]Meuza Kapundu et al., *New Triterpenoids from Napoleonea imperialis*, 19 PHYTOCHEM., 615-22 (1979).

(App. Br. 9.) According to Appellants, in the claimed invention, the "omission of a hydrolysis step, [a] required step of Kapundu et al. provides a composition having strong antileishmanial properties …." (*Id.* at 10.)

Alternatively, Appellants assert that Kapundu's disclosure of a methanolic precipitation step "rises to the level of an 'express teaching' but the totality of the disclosure of Kapundu et al provides a myriad list of possible compounds." (*Id.*) Therefore, according to Appellants, Kapundu "cannot provide the necessary technical reasoning to reasonably support the alleged inherent characteristics flow[] from the teaching of the prior art." (*Id.*)

In support of their contention that the recited therapeutic anti-leishmanial activity is not inherent to the saponin-enriched extract of Kapundu, Appellants submit the declaration of Dr. Christopher O. Okunji. (App. Br. 12.) Appellants assert that Dr. Okunji's declaration explains that in Kapundu "the saponins were first hydrolyzed before isolation and chemical identification of the constituents" and that there are problems associated with hydrolysis of saponins, including "complications with artifact formation, low yields, low selectivity and difficulty with structure elucidation." (*Id.* at 12-13.)

We are not persuaded by Appellants' arguments and declaratory evidence. The Examiner correctly found that Kapundu disclosed a fractionated extract from *Napoleonaea imperialis*, wherein the extract was obtained using an organic solvent and was saponin-enriched. (*See* Ans. 6.) The Examiner also correctly found that Kapundu disclosed using methanol as its solvent, as was used in the claimed invention. (*Id.*) Thus, the Examiner provided a sound basis for finding that the extraction product of

Kapundu was the same as that of the claimed invention, such that the compounds inherently exhibited the same properties, i.e., therapeutic anti-leishmanial activity. *See Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987). Appellants have not established otherwise with the declaration of Dr. Okunji, which distinguishes Kapundu's hydrolysis product with the claimed invention. (*See* App. Br. 12-13; Okunji Dec. ¶ 6.) In other words, Appellants have not provided evidence establishing that Kapundu's intermediate extract differed from the claimed invention such that it would not have inherently exhibited the same therapeutic anti-leishmanial activity as recited by the claimed invention.

Appellants raise additional arguments (*see* App. Br. 15-20) that relate to petitionable matters, rather than to appealable issues. *See* 37 CFR § 1.181. Accordingly, we do not further consider those arguments.

SUMMARY

We affirm the anticipation rejection of claims 1, 11, 30 and 38.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

lp